

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

NO. 76-6172

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

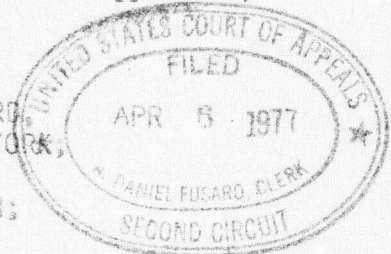
EDWIN NACHBAUR,

Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
POLICE DEPARTMENT, CITY OF NEW YORK,
WALTER DELLHEIM;
ARGO INSTRUMENTS CORPORATION;
and
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK,

Defendants-Appellees.



ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR
DEFENDANT-APPELLEE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

1. Whether the District Court properly dismissed plaintiff-appellant's complaint invoking the jurisdiction of the Freedom of Information Act in an effort to obtain Board records, on the ground that the action was barred by the doctrine of res judicata since plaintiff-appellant sought discovery which had been sought and denied in a prior proceeding.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the appeal of Edwin Nachbaur from an order of the District Court for the Southern District of New York dismissing the complaint of plaintiff-appellant Nachbaur in which plaintiff-appellant

invoked the jurisdiction of the Freedom of Information Act, 5 U.S.C. Sec. 552, as amended, 88 Stat. 1561 (hereinafter "the FOIA") in an effort to obtain, inter alia, records in the investigatory files of defendant-appellee National Labor Relations Board (hereinafter "the Board").

The District Court's Opinion (A. 13-17)^{1/} was issued by Judge Robert L. Carter. This Court has jurisdiction of the proceeding under 28 U.S.C. 1291 and 1294.

I. BACKGROUND

A. Plaintiff-appellant seeks judicial review of Board's dismissal of unfair labor practice charges

On January 23, 1970, plaintiff-appellant filed an unfair labor practice charge (Case No. 29-CA-1906) with the Board's Regional Office for the 29th Region. The charge alleged, inter alia, that plaintiff-appellant's employer, Efficient Instruments Corp. and Argo Instruments Corp. (hereinafter "Argo") violated Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.) by discharging him for engaging in union activities. Plaintiff-appellant withdrew the charge on May 7, 1970, so that arbitration could proceed. The arbitration process culminated June 5, 1970, when Mario A. Procopio, staff arbitrator for the New York State Mediation Board, ruled that plaintiff-appellant had been discharged for just cause. On June 23, 1970, plaintiff-appellant filed a second charge (Case No. 29-CA-2044) with the Board, again alleging a violation of Section 8(a)(3) and (1) of the Act. The charge was duly investigated by the Regional Director

^{1/} "A." references are to the printed appendix of plaintiff-appellant.

who informed plaintiff-appellant on July 31, 1970, that the charge was without merit and that he accordingly was refusing to issue a complaint thereon. The letter stated, in pertinent part:

The investigation fails to establish that you were discharged because of your activities on behalf of Local 3, International Brotherhood of Electrical Workers or for any other discriminatory motive encompassed in your charge. Rather, the investigation tends to establish that you were discharged for insubordination. Moreover, your discharge was the subject of an arbitration hearing. See Spielberg Mfg. Co., 112 NLRB 1080. Nor did the investigation establish that the Company violated the Act in any other manner encompassed in your charge.

Plaintiff-appellant then filed an appeal from the Regional Director's decision, which the General Counsel's Office of Appeals denied on September 15, 1970. Plaintiff-appellant's request for reconsideration of this decision was not timely filed under the Board's Rules and, accordingly, was denied on October 19, 1970. Plaintiff-appellant's additional requests for reconsideration were denied in letters dated December 22, 1970, March 25, 1971 and June 21, 1971.

Plaintiff-appellant subsequently instituted a civil action (No. 71-CIV-3131) in the United States District Court for the Southern District of New York, naming Irving M. Herman, then Director of the Office of Appeals, as the defendant. This action was dismissed on July 12, 1971. Thereafter, on July 20, 1971, plaintiff-appellant filed a pro se petition for review in this Court. The petition again sought review of the General Counsel's dismissal of the complaint. On August 27, 1971, the Board filed a motion to dismiss plaintiff-appellant's petition for review on the ground that the Act precluded judicial review of the General Counsel's processing of charges and refusals to issue complaints. This Court dismissed plaintiff-appellant's petition on September 8, 1971. The Court treated a subsequent letter from plaintiff-appellant,

dated September 19, 1971, as a motion for clarification, and issued a clarifying order on October 29, 1971, stating that plaintiff's appeal was dismissed "on the ground that the refusal of the General Counsel of the National Labor Relations Board to issue a complaint is not reviewable." The United States Supreme Court denied certiorari on February 22, 1972.

B. Plaintiff-appellant files suit against
former employer and Union

Plaintiff-appellant then instituted an action (72-CIV-930) in the United States District Court for the Eastern District of New York naming Argo and the International Brotherhood of Electrical Workers, Local Union No. 3 (hereinafter "the Union") and their officers as defendants, and invoking 42 U.S.C. 2000E(2)(a) and (c), which forbids an employer or labor organization to discriminate against an individual on the basis of race, color, religion, sex or national origin. In connection with that action plaintiff-appellant, in a letter dated August 20, 1972, requested that the full records in Board Case Nos. 29-CA-1906 and 29-CA-2044 be sent to the District Court Clerk of Courts. On September 7, 1972, plaintiff-appellant had a subpoena served on Arthur Goldberg, assistant to the Regional Director of Region 29. The subpoena called for Goldberg to appear and "to conform with the request of [plaintiff-appellant] dated August 20, 1972." Goldberg moved to quash the subpoena on September 8, 1972. The subpoena was quashed by order of Judge Edward R. Neaher on July 17, 1973, since no date for trial or hearing had been fixed.

By order dated September 19, 1973, Judge Neaher appointed John C. Corbett to serve as attorney for plaintiff-appellant. By order dated September 24, 1973, Judge Neaher referred the action to U.S. Magistrate Vincent A. Catoggio for conduct of pre-trial matters and as special

master for purposes of a hearing. On December 12, 1973, plaintiff-appellant again had a subpoena served on Goldberg, as well as 11 other persons. The subpoenas were made returnable on January 9, 1974. Plaintiff-appellant also filed notice with the Court that on January 9, 1974, depositions would also be taken of two other persons, including Marvin Tenzer, attorney for Region 29 of the Board. On January 7, 1974, the Magistrate directed in open court that the return date of the subpoenas be stayed pending further order of the Court. By order dated January 10, 1974, Judge Neaher affirmed the Magistrate's stay of all subpoenas pending preparation of transcripts of testimony taken before the Magistrate and the issuance of the Magistrate's report.

The Magistrate issued a report on February 11, 1974, concluding, inter alia, that "It clearly appears beyond any hope of successful contradiction that the plaintiff was discharged by Argo Instruments Corporation solely because of his own behavior," and that "None of the defendants . . . was guilty of violating any statute of the United States with respect to the plaintiff during and after his employment by Argo Instruments." In regard to the subpoenas, the Magistrate concluded that "to require these prospective witnesses to appear in Court and to be subjected to interrogation by the plaintiff would be a useless, undesirable and highly unjust abuse of the judicial processes."

Plaintiff-appellant then filed a motion to strike the report of the Magistrate. On May 9, 1974, Judge Neaher issued an order denying plaintiff-appellant's motion to strike, adopting the Magistrate's report, and dismissing the action. On May 28, 1974, Judge Neaher dismissed another complaint filed

by plaintiff-appellant against the Magistrate and the court reporter present at the hearing in Case No. 72-CIV-930. In this new action (74-CIV-725), plaintiff-appellant had sought the setting aside of the "altered minutes" of the hearing before the Magistrate on January 9, 1974, and the removal of the two defendants from public office. This Court dismissed the appeal of plaintiff-appellant on April 23, 1975. The United States Supreme Court subsequently denied certiorari.

II. PLAINTIFF-APPELLANT INVOKES THE FOIA
IN AN EFFORT TO OBTAIN DOCUMENTS IN A
BOARD UNFAIR LABOR PRACTICE CASE FILE

In a letter dated April 26, 1975, and addressed to Edward H. Levi, Attorney General of the United States, plaintiff-appellant invoked the FOIA and requested that the Board release "Evidence and documents which the General Counsel of the NLRB used as premise for issuing an administrative ruling (Case No. 29-CA-2044) against me, which was utterly false and damaging to me." The request was referred to Samuel M. Kaynard, Regional Director of the Board's Region 29, on May 1, 1975. In a letter dated May 30, 1975, Regional Director Kaynard denied plaintiff-appellant's request. By letter dated June 20, 1975, plaintiff-appellant appealed this determination to the General Counsel, which appeal was denied on July 29, 1975 (A. 18-20), on the ground that the documents requested are privileged from disclosure under Exemptions 5 and 7(A), (C) and (D) of the FOIA.

III. THE DISTRICT COURT PROCEEDING

On August 29, 1975, plaintiff-appellant filed a complaint (A. 11-12) in the District Court for the Southern District of New York, invoking the Freedom of Information Act and averring that he had been "unrightfully deprived of information vital to the clearing of my name and

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reputation." The relief sought by plaintiff-appellant included the Board's release of "Documents and/or other information submitted by the General Counsel, Regional Office of NLRB and/or other persons [of] NLRB to establish basis of administrative ruling to uphold my dismissal from employment." The General Counsel of the Board was served a copy of the summons by mail on June 21, 1976. On June 25, 1976, plaintiff-appellant filed a notice of motion for an order to amend the complaint so as to seek the additional relief of money damages. On August 13, 1976, the Board filed an answer to the complaint. In its answer, the Board averred that the documents requested by plaintiff-appellant are exempt from disclosure by Exemption 5 and 7(A) of the FOIA. The Board further averred that insofar as plaintiff-appellant sought ~~any~~ damages, the complaint failed to state a claim upon which relief could be granted.

On October 22, 1976, the District Court issued an order (A. 13) denying plaintiff-appellant's motion for appointment of counsel, and dismissing plaintiff-appellant's complaint as to all the defendants. The District Court, in its opinion (A. 14-17) dated October 15, 1976, dismissed the complaint on the ground that it failed to state a complaint upon which relief can be granted, "and on the further ground that the instant motion is barred by the doctrine of res judicata." The District Court stated that the relief sought from the NLRB was "[t]he only item in plaintiff's complaint which is properly before this court," and then went on to hold that "[i]t is clear to me that plaintiff's complaint must be dismissed with respect to this matter" The District Court reasoned that "The discovery sought here has already been sought in connection with a prior action brought by the plaintiff in the Eastern District of New York

before Judge Neaher . . .", and that "it appears that all matters raised in the instant complaint have been fully reviewed in the two prior proceedings before Judge Neaher."

IV. CONCURRENCE OF DEFENDANT-APPELLATE NATIONAL
LABOR RELATIONS BOARD IN PLAINTIFF-APPELLANT'S
REQUEST FOR REMAND TO THE DISTRICT COURT FOR
RECONSIDERATION OF PLAINTIFF-APPELLANT'S CLAIM
UNDER THE FREEDOM OF INFORMATION ACT

As shown by the Statement, supra, pp. 7-8, the District Court, in dismissing plaintiff-appellant's complaint, treated his request for production of Board documents regarding his discharge as a request for discovery, and ruled that since plaintiff-appellant had sought and been denied discovery of the same documents in a prior proceeding, his instant request was barred by the doctrine of res judicata. The record shows that there was a long and involved history of litigation in regard to plaintiff-appellant's discharge, that the documents requested by plaintiff-appellant here were also requested in the prior proceeding (72-CIV-930) in the District Court for the Eastern District of New York and that the court denied the discovery sought in that proceeding.

However, in the instant proceeding, plaintiff-appellant relies upon the provisions of the Freedom of Information Act as grounds for his request that the Board produce the documents in the investigatory files which deal with his discharge. According to the provisions of the Act (5 U.S.C. 552(a)(4)(B)), plaintiff-appellant may seek District Court review of the Board's denial of his request to produce the documents. The District Court has not yet considered the merits of plaintiff-appellant's claim that the FOIA requires the Board, upon request, to produce the documents; nor has it considered the Board's averment that the requested documents are exempt

from disclosure by Exemption 5 and 7(A) of the FOIA. Accordingly, the Board concurs in plaintiff-appellant's request (Br. 13-14) that this case be remanded to the District Court for consideration of plaintiff-appellant's claim under the Freedom of Information Act.

CONCLUSION

For the foregoing reasons, we submit that this case should be remanded to the District Court for consideration of plaintiff's claim under the Freedom of Information Act.

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April 1977.

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CORPORATION; AND UNITED STATES)	
DISTRICT COURT, EASTERN DISTRICT)	
OF NEW YORK,)	
)	
Defendants-Appellees.)	
)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the Board's brief, in the above-captioned case, has this day been served by first-class mail upon the following persons at the addresses listed below:


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